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**Christopher T. Husbands**

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### Discussion paper

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‘An attorney’s bill of costs’<sup>1</sup>: how did it become protected from disclosure by legal professional privilege? (with an appendix giving brief relevant biographical details of the British authors of works cited)

**Christopher T Husbands**

Emeritus Reader in Sociology, London School of Economics and Political Science

**Abstract:** This article examines the process whereby two mid-nineteenth legal cases are still cited by some contemporary authorities, particularly *Halsbury*, for the proposition that lawyers’ bills for professional services as a class of documents are protected from disclosure by legal professional privilege. It examines these two cases in the context of what can be discovered from other sources about the persons involved to test to what extent the reliance on them for this purpose remains, or ever was, justified. The article then presents a meta-analysis of all discovered texts on evidence and discovery published between the date of the first of the two cases and the date of their enshrinement with their current status in the first edition of *Halsbury* (and essentially repeated in all later editions to the current one). It shows how limited was the use of these two cases in the books on evidence and discovery published during the period of analysis. The article concludes with some critical observations on what the analysis shows about legal methodology.

**Keywords:** lawyers’ bills of costs, legal professional privilege; evidence; discovery; *Halsbury’s Laws of England*

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<sup>1</sup> The phrase comes from *Chant v Brown* [1852] 9 Hare 790, 790 and 794.

## 1. *Introduction*

The status of legal textbooks to practitioner lawyers is ambiguous.<sup>2</sup> There is some tendency to treat them with scepticism as a class of document, and yet in many case reports one sees not infrequent reference to the classic examples. Perhaps the best-known of these is *Halsbury's Laws of England*; an electronic search using 'Halsbury' of an online database of cases reveals literally thousands of reports from recent years, in all manner of jurisdictions, containing a Note along the lines of 'For . . . , see . . . *Halsbury's Laws* (4th edn) (2004 reissue) . . .' or, during the most recent couple of years, 'For . . . , see . . . *Halsbury's Laws* (5th edn) (2009) . . .'. This article analyses at length the authority given in all editions of *Halsbury* for the principle of English law, though now subject to revision, that a bill presented by a lawyer, usually by a solicitor to a client, attracts – albeit with some very qualified exceptions – legal professional privilege from disclosure. This protection covers the bill as a class of document, as distinct from the content of the legal advice that is being billed for. The question arose in a case decided in 2007 by the Information Tribunal that overruled the Information Commissioner's defence of the 'conservative' view on the privileged status of lawyer's bills based upon the relevant section of *Halsbury* and, in particular, upon the two nineteenth-century cases that are there held to support it.<sup>3</sup>

## 2. *Halsbury's View Concerning Lawyers' Bills of Costs*

The first edition of *Halsbury's Laws of England* began appearing in 1907,<sup>4</sup> the second edition from 1931,<sup>5</sup> and the third from 1952.<sup>6</sup> The fourth edition was produced from 1973,<sup>7</sup> later reissued over several years from 1988. In volume 37 (on Civil

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<sup>2</sup> Ian McLeod, *Legal Method* (8<sup>th</sup> edn Palgrave Macmillan, Basingstoke 2011) 96–100.

<sup>3</sup> See *Dr Christopher T Husbands v Information Commissioner*, Information Tribunal EA/2006/0048 (16 February 2007).

<sup>4</sup> The Right Honourable The Earl of Halsbury and others, *The Laws of England Being a Complete Statement of the Whole Law of England* (Butterworth & Co, London 1907-1917).

<sup>5</sup> Viscount Hailsham (ed), *The Laws of England, Being a Complete Statement of the Whole Law of England* (2<sup>nd</sup> edn Butterworth & Co, London 1931-1942).

<sup>6</sup> Lord Simonds (ed), *The Laws of England Being a Complete Statement of the Whole Law of England* (3<sup>rd</sup> edn Butterworth & Co, London 1952-1964).

<sup>7</sup> Lord Hailsham of St Marylebone (ed), *Halsbury's Laws of England* (4<sup>th</sup> edn Butterworth & Co, London 1973-1987).

Procedure), paragraph 573 (p 193), of this fourth-edition reissue of 2001<sup>8</sup> – in a section of the work prepared by Harman John Leslie – it states that ‘bills of costs rendered by a solicitor, relating to litigation, actual or in contemplation, are . . . privileged’. The fifth edition of *Halsbury*<sup>9</sup> has been produced from 2008 and in volume 11 (on Practice and Procedure), paragraph 561 (p 449), appearing in 2009, the same passage is reproduced without any amendment, despite some new issues on this topic, especially since the passage fully into law in 2005 of the Freedom of Information Act 2000. Unlike as in the fourth edition, precise responsibility for the various parts of the work cannot be assigned; it is said only that there is a consultant editor with two named editors and two named sub-editors. A review below of the historical case law will reveal the significance of the comprehensiveness of ‘actual or in contemplation’. *Halsbury* goes on to note three exceptions: privilege covers bills only ‘so far as they do not extend to (1) what took place in the presence of the opposite party; (2) communications with the opposite party; or (3) matters of fact which are in the public domain’.

Specifically cited in support of the general position are two nineteenth-century legal cases, one of which is more than 150 years old and the other more than 130 years old. These are *Chant v Brown*<sup>10</sup> and *Turton v Barber*,<sup>11</sup> referred to respectively hereinafter as *Chant* and *Turton*. Both these cases were heard in the Vice-Chancellors’ Courts – within the Court of Chancery, Charles Dickens’ *bête noire* at the time. *Chant* was heard in front of Sir George James Turner, who was a Vice-Chancellor from 1851 to 1853 and who was considered ‘courageous in expanding its [the court’s] remedial powers to meet modern developments’.<sup>12</sup> *Turton* was heard in

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<sup>8</sup> Lord Hailsham of St Marylebone/Lord MacKay of Clashfern (ed), *Halsbury’s Laws of England* (4<sup>th</sup> edn reissue, Butterworths, London 1988-2008).

<sup>9</sup> Lord MacKay of Clashfern (ed), *Halsbury’s Laws of England* (5<sup>th</sup> edn LexisNexis, London from 2008).

<sup>10</sup> [1852] 9 Hare 790. There is also an earlier case report involving the same protagonists; see *Chant v Brown* [1849] 7 Hare 79, which was heard also in the Vice-Chancellors’ Courts before Sir James Wigram, a Vice-Chancellor from 1841 to 1850. It is explained *infra* how the two separate cases arose. Because the later case is that of principal concern to this article, it will be referred to abbreviated simply as *Chant*. When it is necessary to refer to the former case, it will be called *Chant(I)*. *Chant(I)* is no longer cited in contemporary works on evidence, doubtless because at least one particularly generous extension of legal professional privilege that it supported would now be considered a breach of professional ethics.

<sup>11</sup> [1874], LR 17 Eq 329.

<sup>12</sup> See Steve Hedley, ‘Turner, Sir George James (1798–1867)’ in *Oxford Dictionary of National Biography*, at [www.oxforddnb.com](http://www.oxforddnb.com).

front of Sir Charles Hall, who was a Vice-Chancellor from 1873 to 1882.<sup>13</sup> As a negative comment on the integrity of this case as a long-standing precedent is the implication of a recent comment about Sir Charles. Though the subject of a couple of compliments, the view is also expressed about him that ‘he had a thorough and detailed knowledge of case law, though this tended to obscure his view of principle’ and ‘nor did he display a ready mastery of complex questions of fact’.<sup>14</sup>

*Halsbury* does note two other old cases that, for their particular reasons, had been exceptions to this general principle on privilege; these are of interest for their recognition in their specific circumstances of the possibility of redaction. In *Burton v Dodd*,<sup>15</sup> the well-regarded Sir James Stirling<sup>16</sup> ruled that, in general, a bill of costs would be privileged but that, in this case, those entries on the bills of costs that were relevant to the case should be disclosed; the point arose because a defendant was alleging that a compromise agreement should not be enforced against her because she had had no independent legal advice. The applicant had disputed this, seeking disclosure of the relevant bills to establish the point. In *Daily Express (1908) Ltd v Mountain*,<sup>17</sup> it was ruled as in *Chant* that a bill of costs was a privileged history of the transaction in chronological order, but it was equally recognized that the applicant was entitled to details about how the constituent sums were composed.

The statement on the status with respect to privilege of lawyers’ bills of costs as it is found in the contemporary *Halsbury* should be compared with its equivalent in earlier editions. In fact, the particular matter is stated almost identically in the first-edition version in 1910 in the entry on ‘Discovery, Inspections and Interrogatories’.<sup>18</sup> The relevant passage in the latter recurs either verbatim or with only cosmetic linguistic amendment in all the subsequent editions up to and including the current, fifth, one. The second-edition version appearing in 1933 from Sir Alexander Adair Roche and Edmund Gibbs Kimber,<sup>19</sup> the third-edition version appearing in 1955 from George Shorrock Ashcombe Wheatcroft, the fourth-edition version of 2001 from

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<sup>13</sup> See JA Hamilton, ‘Hall, Sir Charles (1814–1883)’, rev Catherine Pease-Watkin, Oxford Dictionary of National Biography, at [www.oxforddnb.com](http://www.oxforddnb.com).

<sup>14</sup> RE Megarry, ‘The Vice-Chancellors’ (1982) 98 LQR 370–405. This is also a useful general source on the status of the Vice-Chancellors’ Courts.

<sup>15</sup> [1890] SJ 39.

<sup>16</sup> See Theobald Mathew, ‘Stirling, Sir James (1836–1916)’, rev Patrick Polden, Oxford Dictionary of National Biography, at [www.oxforddnb.com](http://www.oxforddnb.com).

<sup>17</sup> [1915–1916] 32 TLR 592.

<sup>18</sup> Above (n 4) vol 2 (1910) 75.

<sup>19</sup> Above (n 5) vol 10 (1933) 384–5 under ‘Discovery, Inspections and Interrogatories’.

Harman John Leslie, and the fifth-edition one of 2009 without exactly attributed authorship, are all essentially as in the corresponding text in the first, 1910, version. Thus, the principal difference between the version in the third edition of 1955 (and the earlier editions) and that in the current edition is a modest variation in printing format and a translation into English of a Latinism (*publici juris*, literally ‘of’ but conventionally ‘in the public domain’) in the text of the third and earlier editions. Thus, it is not unreasonable to infer that, given the apparent first use of the cases in the 1910 version for the claim that lawyers’ bills of cost are as a rule generally privileged, this has simply been copied by all the authors of the respective texts in the later editions, probably automatically and almost certainly without recourse to what these original cases actually said and what their precise circumstances were.<sup>20</sup>

It thus becomes of interest to ask who was responsible for the original formulation on lawyers’ bills of costs in the first edition of *Halsbury* and to consider claims for their revered status. The authors of the entry in *Halsbury* were His Honour Judge Bray and Robert Ernest Ross. Bray was initially a Barrister-at-Law in Lincoln’s Inn and from 1919 His Honour Judge Sir Edward Bray; he had obtained a BA from Cambridge in 1873 and in 1910 was a County Court Judge on the South Eastern Circuit in London; he had also at one point played cricket for Surrey, doubtless as a ‘gentleman’. Ross was a barrister-at-law in the Middle Temple; he had obtained an LLB from the University of London in 1898, was one of the sub-editors of the first edition of *Halsbury*, and later became the Principal Clerk of the Court of Criminal Appeal at the Royal Courts of Justice.<sup>21</sup> Because of their importance in unravelling the story of how to *Chant* and *Turton* was arrogated the status that they came to have,

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<sup>20</sup> All editions of *Halsbury*, from 1<sup>st</sup> to 5<sup>th</sup>, also use *Chant* as one of many cases to support the principle that ‘evidence of opinion or belief is also admitted for the purpose of proving handwriting where direct evidence of one who was present when the document was written is not available.’ Eg, above (n 4) vol 13 (1910) 820 607 in the entry on ‘Evidence’, to which no fewer than seven authors contributed including Sidney Lowell Phipson and James Robert Vernam Marchant, the latter perhaps better known as the co-compiler of an edition of *Cassell’s Latin Dictionary*.

<sup>21</sup> For some reason he has been omitted from the class list of 1898 graduates in law given in the respective University of London Calendar and so the class of his degree is not ascertainable; see Calendar of the University of London for the Year 1898-99 (For the University, London 1898) and in immediately subsequent *Calendars*. He appears only in a consolidated listing of all graduates of the Faculty of Law of the University of London in the same year-issue (p 128); see also subsequent *Calendars* for similar listings.

He later also edited Russell on Crime: A Treatise on Felonies and Misdemeanours, 2 vols (9<sup>th</sup> edn Stevens and Sons/Sweet and Maxwell, London 1936) and was joint editor, with Maxwell Turner, of Archbold’s Pleading, Evidence & Practice in Criminal Cases With the Statutes, Precedents of Indictments, etc. and the Evidence Necessary to Support Them (30<sup>th</sup> edn Sweet & Maxwell/Stevens & Sons, London 1938). ‘Russell’ was Sir William Oldnall Russell (c. 1784-1833), who was a legal writer and judge in India. ‘Archbold’ was John Frederick Archbold (1785-1870), a barrister and legal writer.

these authors and their works are discussed separately below in summarizing the legal literature on the treatment of the two cases.

Thus, two nineteenth-century cases, *Chant* and *Turton*, were the legal cornerstone more or less to the present day of how lawyers' bills of costs became privileged. For, despite systematic challenge by some contemporary commentators and even in some case law (though the best such examples are from Australia or New Zealand rather than from Britain), this remains the statement of the current legal position in perhaps the most widely quoted encyclopaedic statement of current law, published in 2009, and is still being quoted or referred to in recent judgments asserting the privileged status of lawyers' bills of costs.

There are certainly modern cases that follow the conventional *Halsbury* view on the matter, even if probably routinely and without any consideration of the relevant precedents or sometimes without having referred to the original cases. A well-known recent example is *International Business Machines Corp and Another v Phoenix International (Computers) Ltd.*<sup>22</sup> This case clearly went to the matter of whether communications between a solicitor and client attract privilege, although it was not centrally concerned as to whether solicitors' bills of costs *sui generis* were so privileged. It was merely that such bills were among the apparently voluminous material in dispute after their inadvertent disclosure, most of which involved substantive legal advice on the matters between the parties and so was what was centrally relevant to their dispute. It was thereupon assumed in the judgment that a 'hypothetical reasonable solicitor' ought to know that they were privileged. Although the judgment follows the standard 'line' on bills of costs, neither party to that litigation had apparently raised specifically the status of a bill of costs as a class of document upon which a judgment concerning privilege was required. The judgment does cite, among three 'older' cases, both *Chant* and *Turton* but, it was clearly using them only as routine 'background' cases to be automatically cited in any matter where the privileged status of bills of costs was an ingredient. Neither case is referred to or discussed in the body of the case report and, suggesting even less real interest in the original, *Turton* in the cited cases is actually called 'Turner'.<sup>23</sup> The relevant passages of *Halsbury* are noted and one cannot but assume that Justice Aldous merely consulted his *Halsbury* and cited (albeit carelessly) the cases found therein supporting

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<sup>22</sup> [1995] 1 All ER 413, FSR 184.

<sup>23</sup> At 415 in the All ER version.

the view that lawyers' bills of cost attract privilege. A more recent case in the Chancery Division<sup>24</sup> followed the IBM/Phoenix position, citing both *Chant* and *Turton* – though noting that the latter, in asserting the status of solicitors' bills, did not 'add much in the way of reasons', but thus suggesting that the original case was at least actually consulted; however, this 2001 case does not mention *Halsbury*.

It is in fact in the Australian and New Zealand jurisdictions where some of the less conservative statements on the status of lawyers' bills of costs with respect to legal professional privilege have been expressed. However, here too is at least one recent case asserting the conservative position. Master Kennedy-Grant in the Auckland High Court<sup>25</sup> cited Master Williams QC in *Crane v Dickson*<sup>26</sup> for his review of the traditional case law and his use of *Halsbury*, *Chant*, and *Ainsworth v Wilding*,<sup>27</sup> to claim that lawyers' bills of costs were necessarily privileged. Kennedy-Grant, however, after his own extensive review of the local case law and issues involved, himself ruled that bills of costs were not brought into existence for 'the purpose of getting or giving confidential legal advice and assurance' and therefore were not privileged. He repeated his judgment, for the same reasons, in a further case some months later where lawyers' bills of costs were also an issue.<sup>28</sup>

A somewhat more recent Australian case in the Supreme Court of the Northern Territory was obliged to rule on similar issues, equally coming to the conclusion that a lawyer's bill of costs was not *per se* privileged.<sup>29</sup> Chief Justice Martin noted that 'bills of costs are not privileged *per se*' but 'they will however be privileged to the extent that they contain or refer directly to confidential matters so as to disclose the subject of the communication'. On that basis various lawyers' bills were adjudged not privileged.

The conservative view of legal professional privilege, that it operates as an absolute defence against disclosure, is well stated in an Australian case from the New

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<sup>24</sup> *Dickinson (t/a Dickinson Equipment Finance) v Rushmer (t/a FJ Associates)* [2001] Ch Div (21 December).

<sup>25</sup> *Re Merit Finance and Investment Group Ltd* [1993] 1 NZLR 152. Thanks are due to Maria Bell, law-specialist librarian at the London School of Economics Library, for her assistance in the Internet search for the Australian and New Zealand cases that have been located and cited.

<sup>26</sup> *Wellington*, CP 425/86 (11 December 1989); this is an unreported case and it has not proved possible to acquire the original case report.

<sup>27</sup> [1900] 2 Ch 315.

<sup>28</sup> *Kupe Group Ltd v Seamar Holdings Ltd* [1994] 3 NZLR 209.

<sup>29</sup> *Alcoota & Anor v CLC [Central Land Council] & Ors* NTSC 30 (2 May 2001).



South Wales Court of Appeal.<sup>30</sup> Chief Justice Spigelman said: ‘One feature which distinguishes a claim of legal professional privilege from a claim of public interest immunity, is that in the case of the former there is no process of balancing conflicting public interests. The law has already undertaken the process of balancing in determining the rule.’

However, that position – though doubtless once sustainable in English law – is certainly no longer generally so. Among exemptions that may be claimed with respect to information requested of public authorities under the Freedom of Information Act 2000 is, in s 42, legal professional privilege. However, this is only a qualified exemption (requiring a balance between the public interest in, respectively, disclosure and non-disclosure), since s 42 is not among the sections listed in s 2(3) of the Act whose engagement implies an absolute exemption.

### *3. The Current Alternative View in English Law Concerning Lawyers’ Bills of Costs*

These cases from Australia and New Zealand are interesting for the revelation that, even in some Anglo-Saxon legal jurisdictions, more flexible approaches to this issue have been propounded. What, however, about English law itself?

*Halsbury*, whilst clearly highly regarded, remains only the opinion of the legal commentators who wrote the originally passages in question and, one has to suppose, of those later editors who have copied these without significant amendments into subsequent editions. Other legal commentators are equally cited by case law as authorities and their views may deserve equal respect. Despite the claim made concerning the supposed pre-eminence of *Halsbury*, the view that it gives on many legal matters tends perhaps to the conservative,<sup>31</sup> and indeed sometimes uninformed by contemporary debates. A case may be made that this is certainly true concerning what it says about the privilege attracted by legal bills of costs, especially in the contemporary climate of public accountability. Instead, the principle of redaction of disclosed material is now a well-accepted one, removing either by indelible deletion

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<sup>30</sup> *Egan v Chadwick and Ors* [1999] NSWCA 176 (10 June 1999).

<sup>31</sup> It might be remarked that *Halsbury* himself, undoubtedly eminent in his time and since, made a distinctive conservative, if temporary, contribution to employment law. As Lord Chancellor, he was a principal actor in the notorious *Taff Vale* decision by the House of Lords in 1901; *Taff Vale Railway Company v Amalgamated Society of Railway Servants* [1901] AC 426.

or physical extraction matter that is inappropriately sensitive or, if disclosed to an opponent, would be prejudicial to the interest of the discloser by perhaps providing an unacceptable litigation advantage to an opponent. The format and detail of solicitors' bills have probably long been variable, perhaps depending on the perceived expectations and importance of the client, the resources of the solicitor concerned, and the branch of law upon which advice has been provided. Some solicitors' bills may be routinely presented to clients with extensive and elaborate itemization of all the individual activities that were being billed for. However, other solicitors' bills are not so presented and could be described as a 'history of the transaction' only with a minimalist concept of what is a 'history'. One is sure that most solicitors would always be willing to provide bills intricately itemized if so requested, but might in some cases want to charge extra for the additional service. Some bills may comprise little more than the total amount, perhaps also any individual amounts summing to this total, (in recent decades) a VAT calculation on the whole, and some such overall description as 'To our professional charges for advice and services . . .' Further itemization, if any, will be separate. It is certainly difficult to see how merely the amounts billed for and such vague and anodyne itemizations could of themselves provide a litigation advantage in most sorts of case. If more detailed itemizations were provided and were of such detail as to reveal, say, the precise nature of legal advice, or its content, then of course that might, in ongoing litigation, be privileged and could be redacted.

Doubtless with such distinctions in mind, the principle of possible redaction is well stated in the first current major and no-nonsense challenge on this matter in English law against the orthodoxy of *Halsbury*, which appeared in the fifteenth edition of *Phipson on Evidence*<sup>32</sup> in the chapter on legal professional privilege written by Charles Simon Hollander. This is of significance because the passage differed crucially from the equivalent one prepared by an earlier author of the fourteenth edition of *Phipson*, which had appeared in 1990. Hollander was a contributor to *Phipson* for the first time with its fifteenth edition and brought a new and contemporary perspective to the issue. He says, referencing *Chant* and *Turton*:

There is some old authority that lawyers' feenotes are privileged from production. There is no reason why there should be a rule that this should be so .

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<sup>32</sup> MN Howard (ed), *Phipson on Evidence* (15<sup>th</sup> edn Sweet & Maxwell, London 2000) 20–20, 517–518.

. . . The better view is that solicitor's bills are capable of attracting privilege if their contents betray or may betray the nature of the legal advice given. . . . It may thus be permissible to blank out relevant parts of the bill.

By the seventeenth edition of *Phipson*, in the corresponding passage also written by Hollander, he comes down even more fully than in the fifteenth edition in favour of redaction.<sup>33</sup> What is said about lawyers' fee-notes has been revised even from the previous, sixteenth, edition so that these paragraphs now firmly support the principle of revelation of non-litigation-relevant material, whilst prescribing redaction before disclosure to remove potentially sensitive matter.

Old authority suggests that feenotes are privileged. It was so held in *Chant v Brown*, where Turner V.C. said that such bills are privileged on the ground that "an attorney's bill of costs is, in truth, his history of the transaction in which he has been concerned". In *Turton v Barber*, Hall V.C. took the same view, although there is not much by way of reasoning. In "*Daily Express*" (1908) *Ltd v Mountain* the Court of Appeal again held that a bill of costs was privileged because it contained the history of the transaction in chronological order, although Swinfen Eady L.J. recognised that the applicant was entitled to particulars as to how the sums were made up. . . . *Bray*<sup>34</sup> stated that solicitors' bills of costs were privileged. More recently, Aldous J. said in *IBM v Phoenix International (Computers) Ltd* that a reasonable solicitor would have been in no doubt that solicitors' bills disclosed on discovery were privileged documents disclosed by mistake, and River J. held, following the above authorities, that solicitors' bills are privileged in *John Dickinson v Duncan Rushmer*.

In most cases, solicitors' bills of costs will not be disclosable because they will not be relevant. In cases where they are relevant, there can be no doubt that solicitors' bills are capable of attracting privilege if their contents betray or may betray the nature of the legal advice given, and that such an analysis is consistent with the *Balabel*<sup>35</sup> approach. It is suggested that a blanket rule is neither necessary nor consistent with modern principles of privilege. The way in which bills are submitted is a matter of practice and will vary with time, and there is no reason why the court should be hidebound by old authorities. If a bill of costs does not reveal anything as to the contents of the communications between lawyer and client, why should it attract privilege? An approach which has much to commend it is that taken in New Zealand where it has been held that bills of costs and statements of account are not privileged by their nature, but that they may be privileged, or parts may be blanked out, if disclosure would in respect of the particular bill tend to reveal the privileged matters.<sup>36</sup>

<sup>33</sup> Hodge M Malek (ed), *Phipson on Evidence* (17<sup>th</sup> edn Sweet & Maxwell/Thomson Reuters, London 2010) 23–52, 668–9.

<sup>34</sup> *Ie*, Edward Bray, *The Principles and Practice of Discovery* (Reeves and Turner, London 1885), but see *infra* on the actual tentativeness of this reference.

<sup>35</sup> *Balabel and Another v Air-India, CA* [1988] 1 Ch 317, 2 All ER 246, 2 WLR 1036.

<sup>36</sup> Exactly the same passage appears in Hollander's single-authored work; see Charles Hollander, *Documentary Evidence* (10<sup>th</sup> edn Sweet & Maxwell/Thomson Reuters, London 2009) 12–12, 266–7.

#### 4. *The Status of **Halsbury** as ‘the Last Word’ on the State of the Law*

The authority to be given to works that purport to be statements of the law or commentaries on, or claimed clarifications of, the law (as opposed to the authority of the actual law or to its interpretations by case law) has, of course, produced many comments in legal judgments. Nor is there any difficulty in finding judgments that have referred, explicitly or by implication, to such works and have been guided by what they have said. Many examples could be cited.

However, *Halsbury* has not been the only work in the twentieth century that sought to give a comprehensive and encyclopaedic general statement of English law on every law-related matter. There was also the *Encyclopaedia of the Laws of England With Forms and Precedents by the Most Eminent Legal Authorities*. A second edition (‘revised and enlarged’) of this work, edited by Alexander [later, Sir Alexander] Wood Renton and Max[well] Alexander Robertson, appeared between 1906 and 1909. This was published in fifteen volumes by Sweet & Maxwell, and then with two supplementary volumes. Volume 16 included amendments and additions to the end of 1913, whilst Volume 17, edited by Bertram Jacobs, included these to the end of 1918. Production of this work seems to have expired, leaving the field to *Halsbury*, because of the Second World War. A full third edition was being published by Sweet & Maxwell from 1938, when its first volume appeared. It reached only its fifth volume in 1940, which was the last ever to appear. Its Editor-in-Chief, Sir Ernst Arthur Jelf, was already aged seventy-two in 1940 and died in 1949, perhaps removing the final impetus to extend the series.

Referring back to the second edition, it is relevant in connection with the content of the present article that nowhere in the entire seventeen-volume work is either *Chant* case or *Turton* cited. The entry on ‘Evidence’, written by Joseph Gerald Pease in Volume 5 (1907), 378, in discussing legal professional privilege mentions several cases, including two still often cited (*Greenough* and *Minet*, both mentioned below). There is no mention of the status of lawyers’ bills of costs issued by them. Likewise, the entry on ‘Interrogatories’, written by Edward Louis de Hart in Volume 7 (1907), 417, mentions legal professional privilege in the context of discovery; again,

however, there is no specific reference to lawyers' bills of costs, nor to *Chant* or *Turton*.

It is intriguing to speculate whether, if it had been *Halsbury's* further production that was somehow curtailed by the War and if Fate had then reversed the respective life-spans of the *Encyclopaedia* and of *Halsbury*, there would be any contemporary citations as precedents of these nineteenth-century cases.

*Halsbury* has thus become the more enduring and is the work that has, perhaps because of its periodic new editions, come closest to attaining the patina of last-word authority on the state of the law at any particular time. It is a work whose editors and contributors have for the most part been practising lawyers, predominantly barristers and judges of varying seniority rather than solicitors. It remains only an expression of the legal opinions of its contributing authors and, illustrious though these may be, their opinions may be subject to challenge as appropriate. Still, *Halsbury* is surely more than a 'textbook', as it is described by McLeod,<sup>37</sup> a description usually given to works written by academic lawyers (some of whom may of course also practise professionally, usually as barristers).

It is not difficult to find examples of other respected authorities on the state of the law, or of commentaries in law textbooks, articles and the like, that reject, either explicitly or by clear implication, a statement of the law as found in the relevant edition of *Halsbury*. It is less easy to find actual legal cases that do so. However, two examples do show that *Halsbury's* statements of the law are not always to be considered sacrosanct by the courts. They are on occasion judged as simply wrong.<sup>38</sup>

The first example is *Watson v Thomas S Whitney & Co., Ltd and Another*,<sup>39</sup> which found against a statement in the third edition of *Halsbury* about whether the Court of Appeal had jurisdiction to hear a particular appeal. The case had started in the Liverpool Court of Passage in the days when various cities had their own 'particular courts'; decisions of this Court of Passage were given by its registrar. *Halsbury* said that 'appeals from the registrar on other than interlocutory matters lie to

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<sup>37</sup> See McLeod (n 2) 99.

<sup>38</sup> Dissent even from the highest legal authority has a very honourable pedigree; see, for example, the iconic early work of legal scholarship by James [later, Sir James] Wigram, *Points in the Law of Discovery* (Charles Hunter, London 1836). Despite its modest size, this is a major legal attack on some leading judgments of his time. However, the work has little of relevance on solicitor/client privilege.

<sup>39</sup> AC [1966] 1 All ER 122, [1966] 1 WLR 57, 130 JP 109.

a divisional court of the Queen's Bench Division'.<sup>40</sup> It was Lord Justice Diplock, in the Court's third judgment, who determined after assuaging his initial doubts that, against *Halsbury* and after an inspection of the authority cited by *Halsbury* but then of the relevant section of the Liverpool Corporation Act 1921, it was the Court of Appeal which did have jurisdiction on the appeal in question.

The other example is *Ex parte Weber*,<sup>41</sup> which found against a one-time German national Antonius Charles Frederick Weber, who had not naturalized and who at the time of the First World War was claiming, on the basis of a more-than-ten-years absence from Germany, to be stateless and therefore not liable to internment as an enemy alien; the statelessness was the alleged implication of the German nationality statute of 1873. Although *Halsbury* was not explicitly referred to, it is known from records in the National Archives<sup>42</sup> that the Home Office was worried about the implication of an albeit tentative footnote statement in the first edition of *Halsbury*<sup>43</sup> suggesting that such a person might be stateless if he had not become a naturalized Briton, and it was apprehensive about putting the matter to a test before the courts.

The rejection of the appellant's case was on the basis of the requirements of a German military statute of 1874 which said that 'Germans who had lost their nationality and had not acquired any other were bound, on returning to Germany in order to take up permanent residence there, to present themselves for military service, provided that they were not bound to serve in time of peace after the completion of their thirty-first year' – to quote the headnote of the case report. Given the state of war, the provision self-evidently would not have excused Weber from military service if he had returned permanently to Germany, irrespective of his more than ten years' absence. The German law also provided for advantages with respect to nationality for long-absent former Germans returning to Germany who wanted to renew their German nationality, advantages that were denied to those who had never had such nationality. Accordingly, Weber's application for a writ of habeas corpus failed.

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<sup>40</sup> Above (n 6), vol 9 1152 504. The title in question in *Halsbury* was prepared by Sir Raymond Evershed (as he then was, Master of the Rolls), Victor Martin Reeves Goodman, John Dallas Waters, and John Harold Ellison.

<sup>41</sup> [1916] 1 KB 280; [1916] 1 AC 421.

<sup>42</sup> See National Archives, HO45/10734/258157.

<sup>43</sup> Above (n 4), vol 1 662 302. The authors of this entry were William Ernst Browning, William Haldane Porter, and Cecil Bertram Gedge.

Despite *Halsbury*, though he was no longer German, he was apparently not quite un-German enough, and he continued to be banged up as an enemy alien.

### 5. *The Status of Chant and Turton as Case-Law Precedents for the Privilege of Solicitors' Bills of Costs*

As *Chant* and *Turton* are still routinely cited as authority for solicitors' bills of costs being privileged, these cases, though long-standing, have not been formally overruled by any precedent-setting court, despite the odd chink made in their armour. Until they are, one has to assume that their authority remains the essential position under English law. Indeed, we suggest that they are often cited by present-day commentators and in present-day case law without reference to what the cases themselves actually say or most certainly ignorant of what their contemporaries said about them. In fact, with some few exceptions to be discussed below, the citations of each of these cases made by the numerous of their contemporarily respected commentators in the nineteenth and early twentieth centuries whose writings have been consulted do not cite them for the purpose of establishing specifically that a solicitor's bill of costs to his client is privileged. It is instructive to examine how, if at all, these cases were used and treated in the numerous treatises on discovery or on evidence throughout the second half of the nineteenth century through to the baldly uncomplicated statement of the relevance of *Chant* and *Turton* together in support of the privileged status of a bill of costs seen in the first edition of *Halsbury*, and repeated verbatim in the single-authored work on discovery by one of the *Halsbury* contributors that appeared in 1912.

What follows are brief outlines of what *Chant* and *Turton* were actually about and how the issue of a solicitor's bill of costs insinuated itself into their proceedings. After that is given what is sought to be as comprehensive a review as possible of the relevant law texts appearing from 1852 to 1912,<sup>44</sup> focussing on the most relevant editions of what, like many law books then and now, were often many-editioned publications and, where different editions of the same work are introduced, doing so

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<sup>44</sup> For a comprehensive statement on the general status of professional privilege in the immediately pre-*Chant* era, see S March Phillipps, *A Treatise on the Law of Evidence, With Considerable Alterations and Additions*, 2 vols (9<sup>th</sup> edn Saunders and Benning, London 1843) vol 1 162-76. However, there is no specific discussion there of lawyers' bills of costs as a class of documents and *Chant* does seem to be the first case where their status with respect to privilege was an issue.

only when there has been a significant change between editions. In the course of this review, we necessarily also touch upon how the concept of legal professional privilege evolved in nineteenth-century case law to the point that *any* communication between solicitor and client was normally considered to attract client privilege, so that some authors seemed to assume – explicitly or by implication – that lawyers’ bills of costs were privileged without the apparent need to assert any specific case-law authority for this. As we shall see, it is indeed only with the first edition of *Halsbury* that these cases were originally set down as unvarnished prescriptive authority for the privileged status of solicitors’ bills of costs.

*A. Chant v Brown [1852] 9 Hare 790*<sup>45</sup>

This case was one of the many in the first half of the nineteenth century that arose from the general uncertainty at the time about issues of legal ownership and transfer of property, issues that, according to one writer, fuelled the demand for proper civil registration because birth-dates and legitimacy and a method of proving these were often important in property and probate disputes of the time.<sup>46</sup> Explaining briefly quite what this case was about is not made easier by the fact that the events at issue occurred over a near-fifty year period and involved a cast of characters almost as numerous as in a Tolstoy novel. Even counting only the living, there were two plaintiffs (Chant and his wife) and as many as twelve defendants. A further source of complication is that the relevant *dramatis personae* contain three different women forenamed ‘Mary’. The principal facts are taken from the fuller account in *Chant(I)*,<sup>47</sup>

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<sup>45</sup> A detail that seems to have escaped all reports except two (see *infra*, nn 47 and 75), then and since, was that the correct spelling is ‘Browne’, not ‘Brown’, as is clear from the Court of Chancery’s original hand-written records, plus census and probate records. The correctly spelt surname is used when the persons concerned are referred to.

<sup>46</sup> Edward Higgs, *Life, Death and Statistics: Civil Registration, Censuses and the Work of the General Register Office, 1836-1952* (Local Population Studies, Hatfield 2004) 8–9; however, birth-dates and legitimacy were not particularly issues in this case.

<sup>47</sup> Many of the records of this case survive in the Chancery records hand-written on vellum in the National Archives, indexed (correctly) as *Chant v Browne* [National Archives, C14/800/C28]. These include the plaintiffs’ original bill of complaint, the several answers of the defendants to this, the amended bill of complaint and the corresponding answers to that, plus a sworn statement of witnesses’ answers to interrogatories arising from the amended bill. *Chant (I)*, as *Chant v Brown*, did achieve a short report in *The Times* on 19 January 1849, specifically reporting only the point that a solicitor with a personal interest in a transaction none the less could expect professional privilege about it. There was no report in *The Times* concerning *Chant*. There was a notice in *The Times* (10 November 1851) that it was to be heard that day and a law notice also in *The Times*, on 24 May 1852, that the case was ‘For



supplemented by other research on the persons concerned. The case reports of both *Chant(I)* and *Chant* concern only a determination of matters of legal evidence that had arisen and were not substantive judgments on the plaintiffs' actual complaint, despite the announcement of a scheduled judgment in the law notices of *The Times* on 24 May 1852. If a substantive judgment was indeed given, it was not included in the *Chant* report. Between *Chant(I)* and *Chant* there was an amendment order on the case dated 10 February 1849. The judgment in *Chant(I)* came from the original bill of complaint of 15 February 1848, and that of *Chant* was from the amended bill of complaint dated 23 February 1849.

There were in fact six Brownes involved among the defendants, but the most significant was Augustus Pulsford Browne, followed by George Townsend Browne. The case was indeed about principles of discovery and legal professional privilege, the former defendant being a solicitor and the latter a legal counsel. The two Brownes had at an earlier stage in *Chant* been asked by the principal plaintiff, Robert Chant a wine and spirits merchant, to disclose material that they had withheld on ground of privilege. This 'exception to sufficiency' had been allowed by 'the Master'<sup>48</sup> and so the case before Sir James Wigram in the Vice-Chancellors' Courts was essentially an appeal against that lower decision.

Back in 1805 Edward Melton, a farmer, and his wife Mary (born about 1781) made a settlement at their marriage whereby their joint posthumous interest in a Devonshire estate should devolve by default equally on to all of their children, or on to one or more of them as he, Edward, should think fit – an arrangement that one could have predicted might bring later grief! There were five children of the marriage. Edward Melton died in 1834 and Mary, his wife, in 1847. One of the five children was Margaretta, who was born in 1817 and had married Robert Chant (born in 1810) at South Molton in 1839. Another was Mary Melton, who had been born in 1807 but never married. In May 1828 Edward, by a legitimate deed of settlement, had given sole interest in the estate to his daughter Mary Melton, which occurred shortly after her twenty-first birthday. Then, there was a further arrangement in September 1828 between Edward Melton, Mary his wife, Mary his unmarried daughter, a John

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Judgment' on that day. This suggests that the legal points raised by the case were picked up by the reports, but that there was little interest in the final substantive outcome of the proper case.

<sup>48</sup> This would have been the Master of the Rolls. Before the abolition of the post in English law in the reform of Chancery in 1852, there had been an office called Master in Chancery, which was one of the twelve assistants of the Lord Chancellor, the chief of these being Master of the Rolls.

Timewell, and the defendant Augustus Pulsford Browne, to transfer the interest in the estate to John Timewell as security for a mortgage of £4,600, which was then paid to Edward Melton and the money used by him for his own purposes. John Timewell, however, died in 1836 but bequeathed his interest to the defendant George Townsend Browne, and to his nephew Francis Timewell upon trust for the separate use of Mary the wife of August Pulsford Browne for life, the remainder to Augustus Pulsford Browne for life. John Timewell had appointed Mary Pulsford Browne, George Townsend Browne and Francis Timewell as his executors. Chant's pleading was essentially that the May 1828 arrangement, but particularly that of September 1828, were a fraudulent exercise by Edward Melton, intended to provide for himself money that was really for the benefit of his children, and that before advancing the money John Timewell knew of the nature of this fraud by Edward Melton. As evidence of this, Chant alleged that Augustus Pulsford Browne had been the solicitor of John Timewell and of Edward Melton in the preparation of the deed and the mortgage and so necessarily knew the nature of the transaction. Further, he pleaded that these facts of the case were in an account of the proceedings prepared at the time between Edward Melton and Augustus Pulsford Browne, and by then in the possession of the latter. Chant sought to have the appointment deed of May 1828 and the mortgage deed of September 1828 set aside on the ground of the alleged fraud of Edward Melton and of the knowledge of this by John Timewell. The effect of that would have been that the estate, or a share of it, would go to Chant via his wife's interest in it.

Sir James Wigram's arguments in favour of the privilege of the Brownes are set out at length in *Chant(I)*, especially relying on the treatment of the comprehensiveness and durability of privilege in Phillipps' *Treatise on Evidence* (presumably the ninth edition), although he, or the case reporter, showed the typical lawyers' foible by misspelling Phillipps' name.

*Chant*, three years later, was concerned with two particular privileged matters, including two aspects of the status of a solicitor's bill of costs. The Brownes now sought to suppress material that they must have thought harmful to their defence but they did so on the ground that its disclosure would be in breach of professional confidence. One of the items that they sought to suppress was a hand-written bill of costs prepared in connection with the Melton case by one William Thorne, clerk to Augustus Pulsford Browne, that was referred in the so-called 'fifth interrogatory' as document N. Sir George James Turner, a Vice-Chancellor after Wigram's resignation,

was willing to allow it only to the extent of proving the handwriting of the witness, summarising his view on the general principle of its admissibility with the sentence: ‘An attorney’s bill of costs is, in truth, his history of the transactions in which he has been concerned; and if he cannot be called to prove the facts I think his clerk cannot be called to prove the history of them’. This statement is absolute and makes no concession to the likely variety of itemizing detail in bills of costs.

All parties involved emerged from the experience of the case without too much apparent long-term damage. Robert Chant lived on till 1901, dying of ‘natural decay’ at the age of ninety-one. His wife Margaretta had died in 1899 aged eighty-three. Between them from 1840 to 1864 they managed to produce at least eight sons and three daughters, only one of whom died very young. Mary Melton remained a spinster and died in 1890 at the age of eighty-two. There were presumably no hard feelings between her and the Chants as she was living with them as housekeeper in 1871 and her sister Margaretta was with her when she died. None, however, left an administered or probated will. Augustus Pulsford Browne died in 1875 aged eighty-four, leaving an estate of under £800. His wife Mary had died in 1867 aged seventy-three. George Townsend Browne had died in 1856, probably aged about seventy-four. Francis Timewell, an affluent farmer, died in 1860 aged sixty-four.

#### *B. Turton v Barber [1874] LR 17 Eq 329*

This case is initially intriguing in that, unusually, the name of neither protagonist appears in the now-cited case report of 1874. Why this is so will become clear from the following discussion. The case was occasioned by matters arising from the estate of Thomas Hincks of Willenhall in Staffordshire, who died aged ninety on 23 November 1865 and is described as a ‘gentleman’. His will, proved at Lichfield on 1 January 1866, named his daughters Sarah Barber, a widow, and Mary Hincks, wife of Joseph Hincks (a wine merchant) as his executrixes. This Joseph Hincks, to be identified as ‘the elder’, was not actually an executor of the estate. The will plus its two codicils is quite a lengthy document, briefly mentions mining, but contains no specific mention of the named mines featured in the 1874 case report.

*Turton* arose from complaints in two cases that the executrixes of Thomas Hincks’ estate were not fulfilling their duties of office. The bill of complaint of Frederic Turton (a surgeon), Mary his wife and Sarah Hincks a spinster against the

defendants Sarah Barber, Joseph Hincks (the elder) and Mary his wife was filed in the Court of Chancery before Vice-Chancellor Stuart<sup>49</sup> on 14 September 1866. Mary Turton and Sarah Hincks were granddaughters of the testator the elder Thomas Hincks, being two of the surviving children of Thomas Hincks (the younger), the testator's deceased son who had died on 1 November 1862. The executrixes of the will were accused in the Turton/Hincks bill of complaint variously of having appropriated Thomas Hincks' personal estate, of having entered into his real estate, and of failing to provide a proper accounting of the estate. Just a couple of months before, on 13 July 1866, Joseph Hincks the younger and John Charles Hawkesford Hincks (both sons of Mary Hincks and Joseph Hincks the elder) had entered a similar complaint in the Court of Chancery before the Master of the Rolls against the same defendants (except that Barber is here listed last).

In the case of *Turton* the Hinckses filed a joint answer on 9 November 1866 seeking to exculpate themselves and putting the blame for any default on to Sarah Barber. She in turn had filed a robust defence of her conduct in an answer dated 26 October 1866 specifically against the charges against her made by the junior Hinckses.<sup>50</sup>

The case then continued intermittently. On 14 January 1867 there was a hearing before Vice-Chancellor Stuart. Doubtless as a result of this, a decree from the Court of Chancery dated 25 February 1867 was published in *The Times* of 2 March requiring all with a claim against the estate of Thomas Hincks deceased to specify the nature of that claim and to produce it to Vice-Chancellor Stuart. Although there is no known surviving documentation on the matter, it must surely have been in response to this that Matthew Tildesley and John Harper, who figure prominently in the case report, came forward with their claim against the estate.

Except for the 1874 deposition, there is no surviving documentation as how the case then proceeded, but it is known that there was a brief hearing of it before Vice-Chancellor Sir John Wickens<sup>51</sup> on 9 February 1872.

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<sup>49</sup> Sir John Stuart (1793-1876), Vice-Chancellor from 1852 to 1871.

<sup>50</sup> Some limited material from both cases survives in the records of the Court of Chancery in the National Archives. The file of *Turton v Barber* [National Archives, C16/380/T114] contains the plaintiffs' bill of complaint, two answers (in fact, the joint answer of the Hinckses in hand-written and printed versions) and the original hand-written deposition of the Special Examiner in 1874 that features prominently in the case report. The file of *Hincks v Hincks* [National Archives, C16/348/H174] contains the plaintiffs' bill of complaint, interrogatories, and two answers (the answer of Sarah Barber in hand-written and printed versions).

<sup>51</sup> Sir John Wickens (1815-1873), Vice-Chancellor from 1871 to 1873.

The report on this case by Vice-Chancellor Hall that has been bequeathed to us as its only account<sup>52</sup> is a perfunctory document. Hall was the third Vice-Chancellor since 1866 to have had this case before him and, as with the two *Chant* reports, this one too concerns only some specific points of law that had arisen; it was not a judgment on the substantive merits of the proper case. The report is not written up quite as the next-morning account from back-of-a-menu jottings made during an evening of indulgence in Lincoln's Inn but, despite the relative simplicity of the original issues, it reads as having a degree of superficiality. One can see the point of its present-day commentators who note that its argument on the status of a solicitor's bill of costs is supported by not much in the way of reasoning. Even conceding the limited matters that it was determining, the report has none of Sir James Wigram's elegant reasoning in *Chant(I)*, nor even of Sir George James Turner's in *Chant* – but then both these, especially Wigram, would be recognized now as nineteenth-century legal minds greatly superior to Hall's.

The facts on the specific matters in the case report are as follows, and there is nothing of the background of the other issues described above. The case report starts by saying that Joseph Hincks, described as 'the testator in the cause' (a mistake, of course, as it was really Thomas Hincks the elder, as discussed above), was the owner of two mines in Staffordshire and in 1864 negotiations were opened between him and Matthew Tildesley of a firm Harper & Tildesley for the lease of the two mines. The report says that adjoining these two mines was a third one, owned by a third party, whose acquisition was desirable in order to be able properly to work the first two mines – however, that information is a 'lay *obiter*' since it is not mentioned again in the report and has no apparent relevance to any of the principles of the case. In 1864 a preliminary agreement was entered into between the parties (ie, Thomas Hincks on the one hand and Tildesley and Harper on the other) for one lease on the first two mines. Then, complications having arisen, a lease on the first mine only was granted in June 1865, and an agreement for the lease of the second mine was drawn up, but the actual transfer was not made. Tildesley and Harper then made arrangements to work the two mines together, expending money on machinery and other equipment for the purpose. Then, in 1865 when Hincks died it was subsequently found impracticable actually to grant the lease on the second mine. Probably as a result of

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<sup>52</sup> Neither this particular hearing of the case nor details of its final denouement were reported in *The Times*.

the 1867 announcement for those claiming to be creditors of the Hincks estate, Harper and Tildesley made their claim for damages for what they had sustained by reason of the non-performance of the agreement to grant a lease on the second mine, having – so they claimed – expended their money to no purpose acting on their previous assumption that they would acquire the lease of the second mine.

In furtherance of this claim, Tildesley made three affidavits, whereupon he was required by the plaintiffs (ie, Turton *et al.*) to attend to be cross-examined on the matter before an officer known as the Special Examiner (named Francis Bacon!) and to bring with him the bill of costs delivered by his solicitor in the matter of the lease. Tildesley refused to answer, on the basis of lawyer-client privilege, a question about matters discussed between him and his solicitor concerning the preliminary agreement to lease both mines. He also refused to produce the bill of costs, which he had paid. The case then moved back to the Vice-Chancellors' Court because the plaintiffs moved to have Tildesley to appear before it to answer the question that he had refused to answer and to produce the bill of costs that he had refused to produce. It was the former matter that was clearly the more important and Vice-Chancellor Hall, in dismissing arguments by the plaintiffs' counsel in favour of admissibility and for an order to answer the question asked (these arguments included a quotation from an early edition of John Pitt Taylor's work on evidence introduced below), said merely that *Minet v Morgan*<sup>53</sup> had settled the matter that the protection of privilege also extended to communications in anticipation of or simply before litigation, and he would follow that guidance. The issues around the bill of costs were clearly secondary to Hall. His judgment merely says in conclusion:

As to the bill of costs, that also is, in my opinion, privileged. The only object that could be in view in obtaining production of the document would be to get in the thin edge of the wedge, and so entangle the witness in the difficulty of answering other questions. A solicitor's making an affidavit as to documents is no waiver of privilege.

It is important to note that in *Turton* the issue of whether a solicitor's bill of costs attracted privilege was not the head one of that case. Its more significant principle was

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<sup>53</sup> [1873] LR 8 Ch App 361. This important case, determined a year earlier in the Court of Appeal in Chancery by the Lord Chancellor Roundell Palmer, the first Earl of Selborne (1812-1895), made clear that there was no distinction in the attraction of privilege between communications between a solicitor and his/her client made with a view to litigation and those made before any litigation.

whether communications between solicitor and client made before litigation was anticipated were privileged, a decision determined in the positive. Indeed, to the extent that one can detect any reasoning behind Hall's judgment on the bill of costs, it is permissible to infer that, in this case, its production would have given the plaintiffs an unacceptable litigation advantage, which is presumably how the phrase 'to get in the thin edge of the wedge, and so entangle the witness in the difficulty of answering other questions' is to be interpreted. The exact format of the bill of costs in the case is lost for ever but, if that interpretation of his phrasing is correct, the reason for his refusal to order disclosure was entirely concerned with the possibility of an improper litigation advantage – a concern as reasonable now as it apparently was then – and little or nothing to do with the status of a bill of costs as a class of document *per se*.

The case report includes almost verbatim the text of the deposition of the Special Examiner, the original of which in its hand-written form survives in the *Turton* file in the National Archives. The report's egregious error, probably made by the case reporter rather than by Hall himself, is the misidentification of the 'testator in the cause' as Joseph Hincks when it was really Thomas Hincks (the elder).

The case must have been eventually decided against the plaintiffs since Joseph Hincks (the elder) did eventually receive satisfaction in the overall cause, although – with an irony that Charles Dickens would have appreciated – only after he had died! While a case of equity was being determined in Chancery, the disputed property would have been inaccessible to the possible beneficiaries. Joseph died of what was clearly a stroke on 5 August 1877 and the initial probate on his estate, dated 24 August 1877, noted that his effects totalled under £2,000. However, the will was resworn in April 1878, with the effects now totalling under £9,000 though with no indication on the statement of probate about the source of all this additional money. Reswearing a will is a little uncommon but far from rare; however, most reswearings involve relatively minor adjustments, in relative terms, to the original total of effects. An increase of this relative magnitude is exceptional. It doubtless emerged through the eventual dismissal of the plaintiffs' and of Tildesley's and Harper's claims against Thomas Hincks' estate. Joseph's estate would have had an ongoing interest in this outcome via his wife, Mary, prior to the effect of the Married Women's Property Act 1882. The case did Mary Hincks no harm, living on as she did until 11 July 1888 and managing to hang on to effects valued at £1,104 18s 5d at her death.

Sarah Barber was another whose finances were posthumously benefited. She had been born on 14 February 1808 and married a Joseph Barber on 28 November 1831. He died in about 1858, significantly leaving Sarah a widow. The case report for *Turton* is dated 22 January 1874, but did not finally dispose of the case. For Sarah Barber died of a stroke on 15 August 1874,<sup>54</sup> leaving an estate assessed initially at under £3,000 when her will was first proved at Birmingham on 4 November 1874. However, in October 1879, possibly in consequence of a hearing before Vice-Chancellor Sir Richard Malins<sup>55</sup> on 7 March 1879 on 'Barber's Estate', the will was resworn, giving her estate's value as under £12,000.

As for the fate of the Turtons: Frederic died on 24 February 1875, aged only thirty-eight, of 'softening of the brain' and epileptic seizures, a combination suggesting the possibility of syphilis. He left an estate valued at under £10,000. However, his widow Mary continued bringing up their five children and lived on without remarriage till 8 June 1931, dying at the age of ninety-two and leaving an estate, also after reswearing, of £4,031 15s 6d. Sarah Hincks, who was born in 1843 and who suffered in childhood the death of her mother and a step-mother, plus the appearance of a further stepmother, married her first cousin William Fairbanks in 1873 (see n 54); he died in 1908, but she lived on till 1930, dying in Dorking at the age of eighty-seven and leaving a modest £448 15s 4d.

For Tildesley, this case, and others,<sup>56</sup> seem to have broken him, even if he was not quite a real-life Richard Carstone. In 1871 he had been a hardware merchant and

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<sup>54</sup> Although there is no documentation to the effect, the case was clearly continuing after that date. The National Archives catalogue description of the case, presumably prepared at the time but after the date of Sarah Barber's death, though there is no other surviving record of any of the extra names, is:

Plaintiffs: Frederic Turton and Mary Turton his wife and another; Defendants: Sarah Barber (since deceased), Joseph Hincks and Mary Hincks his wife; Amendments: Amended by order 1868.

Frederic Turton, Charles Grierson De Lessert and William Fairbanks added as [?] Amended by order to revive 1874. John Hincks and Edward Lucas added as defendants.

The '[?]' is as on the catalogue record, presumably as scanned from an illegible hand-written original, though the context suggests that the latter two names were added as plaintiffs, for in 1873 William Fairbanks (who qualified as a doctor on 1 August 1874) became the husband of Sarah Hincks and, as the husband, would have taken over the financial interest in the suit. It is not clear how De Lessert assumed an interest unless he was in, or anticipated being in, a professional partnership with Fairbanks; the former was a dentist and surgeon and in 1871 was living in Wolverhampton, having been born in Dublin in 1817 and dying in 1886. His wife had died in 1870, but she had no immediately obvious link to the case. John Hincks was undoubtedly the son of Mary Hincks and Joseph Hincks the elder but, although a plausible Edward Lucas has been identified, the reason for his involvement in the case is unclear.

<sup>55</sup> Sir Richard Malins (1805-1882), Vice-Chancellor from 1866 to 1881.

<sup>56</sup> Tildesley was heavily involved in litigation in the final decade of his life. In *Staffordshire Joint Stock Bank (Limited) v Frederick John Cleaver and Others (including Tildesley)* [National Archives, C16/892/S20], filed on 30 January 1873, the bank was seeking money owed to it by Tildesley and



owner of an iron foundry and manufactory employing 50 men. On his death from anaemia in January 1879, his effects were assessed at under £100. However, his widow, Mary Ann, was made of sterner stuff. She lived on till February 1908, dying of ‘senile decay’ at the age of ninety. She managed to leave a modest estate valued at £1,150 8s 10d.

#### *6. How **Chant** and **Turton** Are Used in Legal Commentaries On Evidence Published up to 1912*

The following review of how *Chant* and *Turton* are handled in the contemporary legal commentaries is arranged into five categories:

- works that discuss the privileged status of solicitors’ bills of costs and with specific citation support from *Chant* and/or *Turton* only for that purpose – one case, actually a work by Ross published after his *Halsbury* co-contribution
- works that use *Chant* and/or *Turton* to support some point other than the status of solicitors’ bills of costs but also use *Chant* and/or *Turton* in connection specifically with solicitors’ bills of costs – two cases (one being a work by Bray)
- works that use *Chant* and/or *Turton* to support some point(s) other than the status of solicitors’ bills of costs – five cases
- works that discuss the privileged status of solicitors’ bills of costs but without specific citation support from *Chant* and/or *Turton* – one case
- works that do not mention *Chant* and/or *Turton* or the specific status of solicitors’ bills of costs – seven cases

#### *A. Works That Discuss the Privileged Status of Solicitors’ Bills of Costs and with Specific Citation Support from **Chant** and/or **Turton** Only for That Purpose*

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others, Tildesley being involved because he and his partner owed the bank money due to them from the estate of a deceased. In *Harper and Tildesley v Waterhouse* [National Archives, C16/869/H128], filed on 26 May 1873, the plaintiffs were claiming that Harper’s debt to the defendant was discharged by the terms of an earlier will. This case actually arose as a cross-complaint from an earlier suit by Waterhouse against Harper and Tildesley in the Court of Exchequer.

(i) It is perhaps ironic that the only work citing both *Chant* and *Turton* in support of the privilege of lawyers' bills of costs, and for no other purpose, is that of a co-author of the original *Halsbury* contribution, Robert Ernest Ross. This appeared in his independent work on discovery,<sup>57</sup> and all but verbatim with the earlier joint text in *Halsbury*, and so in later *Halsburys*. In fact, it is so reminiscent of the purportedly joint text that one suspects that Ross was solely responsible for that particular passage.

*B. Works That Use **Chant** and/or **Turton** to Support Some Point Other Than the Status of Solicitors' Bills of Costs but Also Use **Chant** and/or **Turton** in Connection Specifically with Solicitors' Bills of Costs*

(i) William Williamson Kerr's 1870 book<sup>58</sup> is a substantial work, one of the most important of those reviewed albeit containing only 312 pages, with as many as 11 references to one or other *Chant* case, four references to *Chant(I)* alone, and three to *Chant* alone, and two to both cases simultaneously. Most of these references use the cases, sometimes with others, to assert particular points on the general principle of privilege – who has it, how far it extends, what happens to the privilege of a second party if the first party in jointly held privilege chooses to waive it, how long privilege endures, whether it can be inherited from a deceased person by somebody continuing a claim of the deceased, and so on. However, somewhat unusually, he does indeed discuss the privileged status of a bill of costs and points out a very narrow and specific derogation from the general rule, where fraud is involved. First, the general rule in such a case:

The mere allegation of fraud is not sufficient to induce the court to break through the general rule [of privilege]. In order to take the case out of the ordinary rule as to privilege, there must be some specific charge in the bill connecting the discovery sought with the fraudulent act complained of. It is essential that the act complained of should on the face of the bill appear to be a fraud [at 126].

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<sup>57</sup> RE Ross, *The Law of Discovery Being a Comprehensive Treatise on the Principles and Practice Relating to Interrogatories, Discovery of Documents and Inspection of Documents in Proceedings in the High Court and County Court* (Butterworth & Co., London 1912) 219.

<sup>58</sup> William Williamson Kerr, *A Treatise on the Law of Discovery* (William Maxwell & Son, London 1870).

That is supported by reference to four case reports, two being the two *Chant* cases. However, later occurs the specific application of the general rule, in the absence of fraud, with respect to a bill of costs, which is that ‘. . . a party will not be ordered to produce his solicitor’s books, whether letter-books, journals, ledger, &c, or *the bill of costs of his solicitor* [emphasis added]’ (at 141). Two cited cases support the italicized point, the first being *Chant*.

(ii) Given the role of Sir Edward Bray as the original co-author in *Halsbury*’s first edition of the material concerning the privileged status of an attorney’s bill of costs, it is especially interesting to note the somewhat tentative route that he took to reach, or co-reach, his final position on the matter. His major text on discovery<sup>59</sup> does indeed refer to the *Chant* cases and to *Turton*. There are five references to *Chant* – as well as a further five to *Chant(I)*. There are two references to *Turton*.

All his references to these cited cases, save as specified below, are to the sorts of other matters for which they were mentioned in the other authorities that have been cited. Only one passage (at 396) concerns both *Chant* and *Turton* with respect to the privileged status of a bill of costs, and its tone is decidedly tentative in comparison with the assertive tone of the *Halsbury* text.

A bill of costs *has been held* [emphasis added] privileged in the hands of the client : *Turton v. Barber*, L. R. 17 Eq. 329 : and of the solicitor : *Chant v. Brown*, 9 Ha. 790 : for, p. 794, it was the solicitor’s history of the transaction in which he was concerned.

### *C. Works That Use **Chant** and/or **Turton** to Support Some Point(s) Other Than the Status of Solicitors’ Bills of Costs*

(i) Sherlock Hare’s new edition of his father’s earlier work on discovery<sup>60</sup> mentions only *Chant(I)* and *Turton*, once each. The latter is mentioned merely

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<sup>59</sup> Edward Bray, *The Principles and Practice of Discovery* (Reeves and Turner, London 1885). As His Honour Judge Bray, he also produced a short work in two editions (both under a hundred pages) on *Digest of the Law of Discovery*, with Practice Notes (Sweet & Maxwell, London 1904, 1910); these were essentially addenda to his original text with later case material. Neither mentioned *Chant* or *Turton*, although *Burton v Dodd* and *Ainsworth v Wilding* both achieved predictable mentions.

<sup>60</sup> Thomas Hare, *A Treatise on the Discovery of Evidence in the High Court of Justice: Being a Second Edition of a Treatise on the Discovery of Evidence by Bill and Answer in Equity, Adapted to the Supreme Court of Judicature Acts and Rules, 1873 & 1875*, by Sherlock Hare (Butterworths, London 1876). The 1<sup>st</sup> edition had appeared in 1835.

because (at 158) it follows the principle of the 1873 judgment of *Minet v Morgan* discussed above. *Chant(I)* is used only to state the widely quoted principle that privilege is not lost even if the solicitor concerned becomes an interested party (at 165).

(ii) John Pitt Taylor's massive two-volume work<sup>61</sup> was produced by its author in numerous editions during his lifetime and the seventh one of 1878 prepared by Taylor himself allows us to see how *Chant* and, by now, *Turton* might have been used. Both *Chant* and *Chant(I)* were cited as cases relevant to the matter of privilege but for three reasons, neither was concerned immediately with any principle specifically or explicitly about solicitors' bills of costs, although it is reasonable that it be inferred that such bills might be included by implication among the extensive general lists of items said to be privileged. Respective sets of cases, including *Chant* in each, support two points:

Where a *barrister* or *solicitor* is professionally employed by a client, all communications which pass between them in the course and for the purpose of that employment are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them, whether they be in the form of title deeds, wills, documents, or other papers delivered, or statements made to him, or of letters, entries, or statements, written or made by him in that capacity [at 765-766].

and:

Clerks cannot be permitted to disclose facts coming to their knowledge in the course of employment, unless a barrister or solicitor himself might have been interrogated respecting them [at 774].

*Chant(I)* supported the point that privilege is not lost or waived by the solicitor's 'becoming personally interested in the property, to the title of which the communications related' (at 779-780). Taylor cites *Turton* (at 778-779) because Sir Charles Hall's judgment in that case specifically followed the precedent established a year earlier in *Minet v Morgan*.<sup>62</sup>

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<sup>61</sup> John Pitt Taylor, *A Treatise on the Law of Evidence as Administered in England and Ireland With Illustrations From the American and Other Foreign Laws* (7<sup>th</sup> edn William Maxwell & Son, London 1878). The 1<sup>st</sup> edition was published in 1848. The omission of Wales from the title doubtless reflects English chauvinism and not any non-jurisdictionality in Wales. Intriguingly, the book retained this same title from 1848 through to its 12<sup>th</sup>, and final, edition in 1931, long after Taylor's death in 1888.

<sup>62</sup> Above (n 53).

Thus, there is no specific reference in this work by Taylor to the status of solicitors' bills of costs.

(iii) John Charles Day and Maurice Powell's updating of the text of the famous legal writer Henry Roscoe<sup>63</sup> did not cite either *Chant* case, but cited *Turton* for the same reason that Taylor does.

(iv) Walter Sydney Sichel and William [later, Sir William] Chance's book of 1883<sup>64</sup> sounds from its title as though it will be comprehensive. However, it has no reference to either *Chant* case and only one to *Turton*, which is used in a footnote in the context only of a 'compare also'. The point being made in the text concerned is:

. . . immediate communications between solicitor and client or their respective agents in the cause to be now "with a view to litigation" need not have owed their existence to a direct contemplation thereof, but may be *ante litem motam*,<sup>65</sup> and if relating to matter which *may* [emphasis in original] become the subject of litigation, will be privileged, and may be described in the schedule or affidavit as referring to matters "*now* [emphasis in original] a question in the cause" [at 64-65].

(v) Clarence John Peile's book<sup>66</sup> appeared in 1883 and included four references to *Chant(I)*, two to *Chant*, and two to *Turton*. In discussing professional confidence and professional privilege, there are no passages concerned specifically with a solicitor's bill of costs. Matters covered are mostly ones already encountered, though a couple are idiosyncratic.

Thus, 'privilege is not waived by the mere fact of the solicitor making an affidavit in the action in support of his client's claim, if it do [*sic* – the charming and now obsolete subjunctive mood] not contain statements as to matters contended to be privileged' (at 52) is supported by *Turton*; the duration of privilege is 'not affected by

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<sup>63</sup> John C Day and Maurice Powell, Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius (14<sup>th</sup> edn Stevens & Sons, London 1879).

<sup>64</sup> Walter S Sichel and William Chance, The Law Relating to Interrogatories, Production, Inspection of Documents and Discovery, As Well in the Superior As in the Inferior Courts, Together With an Appendix of the Acts, Forms, and Orders (Stevens and Sons, London 1883).

<sup>65</sup> Ie, before the suit is started or any controversy exists (the presumption being that the declarant then has no motive to distort the truth).

<sup>66</sup> Clarence John Peile, The Law and Practice of Discovery in the Supreme Court of Justice; With an Appendix of Forms, Orders, etc. (Stevens and Haynes, London 1883). Its Preface refers to 'another [unspecified] work on the same subject' that had recently appeared; one assumes that this may have been the work of Sichel and Chance (see above (n 64)).

the death of the client’ (also at 52) derives support from both *Chant(I)* and *Chant*; and privilege exists ‘where the client was the party from whom discovery is sought in *anticipation* [emphasis in original] of an apprehended litigation’ (at 53) primarily used *Minet v Morgan*, but noted that *Turton* had followed this. Further, ‘the privilege is not confined to the continuance of the action or other legal proceeding in which the communication may have been originally made [supported by several cases, including *Chant(I)*] . . . it applies, therefore, *a fortiori*, where the succeeding proceeding are [sic] substantially the same as the former, i.e. involve or embrace the same issues’ (at 61). This point is supported by several cases, including a generic reference to *Chant v Brown* that in logic suggests that both cases are intended. Finally, ‘upon objections to an answer for insufficiency, the question is whether it was sufficient *at the time it was filed*’ (at 89) is supported by *Chant(I)*.

*D. Works That Discuss the Privileged Status of Solicitors’ Bills of Costs but Without Specific Citation Support from **Chant** and/or **Turton***

(i) The legal writer on evidence whose name has lived on eponymously for more than a century is Sidney Lovell Phipson (1851-1929), whose book on the subject was published first in 1892<sup>67</sup> and came out in five further editions from the hand of the original author, the sixth edition being in 1921. Successive editions do expand, often considerably so, on their respective preceding ones. His first edition does not include *Turton* at all (or for that matter *Burton v Dodd*). Only *Chant(I)* is actually mentioned, and for one of the reasons already given by Taylor – to show that privilege was retained even when the solicitor concerned ‘became personally interested’ in the matter (at 109).<sup>68</sup>

Phipson does note that ‘a party cannot be compelled and a legal adviser will not be allowed to produce documents passing between them in professional confidence’ (at 100). He may have thought that solicitors’ bills of costs would be included in this generalization, but he is only specific on the matter later on. He prepares a table in two adjoining columns respectively listing material that is privileged and is not privileged. Among the former is ‘Solicitor’s bill of costs,

<sup>67</sup> Sidney L Phipson, *The Law of Evidence* (Stevens and Haynes, London 1892).

<sup>68</sup> Further to complicate things, the citation of *Chant v Brown* in the Table of Cases is as ‘9 [sic] Hare 79’, presumably a confusion of the two cases. However, he clearly intends only *Chant(I)*, which is correctly cited where it occurs in the text.

whether in his own or the client's possession'; however, instead of independently supporting this with *Chant* and *Turton* he merely gives, in parentheses, 'Bray, Discovery, 396', ie, the passage quoted above.

In later editions he adopts the same practices with respect to issues and supporting citations and also the same tabular format for privileged and non-privileged materials, but is more expansive on detail. In the third edition of 1902 and fourth of 1907, he says that privileged is 'Solicitor's bill of costs, in his own or his client's possession: entries relating to actual or contemplated litigation (*Ainsworth v. Wilding*, *supra*), or other matters of confidential professional advice or assistance (Bray, Discovery, 396)'. Non-privileged is 'Solicitor's bill of costs: entries which are mere notes or reports of proceedings in Court or chambers in presence of opposite party (*Ainsworth v. Wilding*, *opposite*); or which show who paid the costs of, and were the real parties to, such proceedings (*Irish Soc. v. Crommelin*, *supra*<sup>69</sup>)'.<sup>70</sup>

#### *E. Works That Do Not Mention **Chant** and/or **Turton** or the Specific Status of Solicitors' Bills of Costs*

(i) The edition of the famous work on evidence<sup>71</sup> published immediately after *Chant* and after the death of the original author, Thomas Starkie, has no mention of either *Chant* case, although it contains a relatively brief discussion on the extent of privilege concerning confidential information to and from barristers, attorneys, etc.

(ii) Charles Edward Pollock, in his contribution to the work published together with that of Henry Thurstan Holland and Thomas Chandless,<sup>72</sup> did not cite *Chant* at

<sup>69</sup> [1892] 2 IrLTJo [Irish Law Times and Solicitors' Journal] 265.

<sup>70</sup> At 174 in 3<sup>rd</sup> ed. This format was left unchanged by Phipson in the 5<sup>th</sup> edition of his book in 1910 and even the 6<sup>th</sup> of 1921, though in referring to *Chant(I)* he reverses the citation confusion of his 1<sup>st</sup> edition and is now citing it as '7 Hare 790 [*sic*]'. The 7<sup>th</sup> edition, prepared by Roland Burrows and Charles Montague Cahn after Phipson's death in 1929, which one might have thought an opportunity for a more radical revision, is exactly as in the immediately previous editions from Phipson himself. Perhaps the new editors felt obliged to respect his posthumous reputation. Indeed, they continue the confusion in his reference to *Chant(I)* at 199 but in the Table of Cases cite *Chant* but not *Chant(I)*.

<sup>71</sup> Thomas Starkie, *A Practical Treatise of the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings*, 4<sup>th</sup> edn by George Morley Dowdeswell and John George Malcolm (4<sup>th</sup> edn V. & R. Stevens and G. S. Norton, London 1853) 40.

<sup>72</sup> Henry Thurstan Holland and Thomas Chandless, Jun., *The Common Law Procedure Act, MDCCCLIV, with Treatises on Injunction and Relief; Also a Treatise on Inspection and Discovery*, by Charles Edward Pollock, Together with Notes, Cases, Index and the New Rules and Forms of Michaelmas Vacation (S. Sweet, London 1854) 47. Pollock's portion of the total publication is described as a new edition of a former work by him on the same subject.

all but used only *Chant(I)*, then recently decided, to support the principle that privilege was not lost because the counsel or attorney afterwards became interested in the property to the title of which the communication related. Pollock's work is of incidental interest in drawing a specific early distinction between the privilege of the solicitor and that of the client, in view of the point made by several current-day writers that 'legal professional privilege' is the wrong label since the privilege belongs to the client.

(iii) Although on a relevant topic and offering the possibility of a discussion of *Chant* and of lawyers' fees, William Comer Petheram's work<sup>73</sup> is a relatively short book of 116 pages on the limited topic implied by the title. It contains no reference to *Chant* or to bills of costs.

(iv) The tenth edition of Samuel March Phillipps' book on the law of evidence was apparently published in 1852, to infer from the byline date of his 'Notice to the Reader'. As in the preceding ninth edition of 1843, there was no reference to *Chant(I)*, which had of course been decided in the interim. However, the copy of this tenth edition held by the British Library is in fact the fifth American edition in three volumes that appeared in 1868.<sup>74</sup> Among the additional American Notes is a reference to *Chant v Browne*,<sup>75</sup> cited as '12 Eng. Law & Eq. 299'. This is in the American publication, *English Reports in Law and Equity*, and, from its context, seems to be a reference to the further component of *Chant* not concerned with a bill of costs, though that has not been proved possible to check because the copy once held in the British Library was destroyed in the Second World War.

The principal point made by the American author is that 'the protection afforded to professional confidence applies not only to the professional advisers of the parties to a suit, but also to the professional advisers of strangers to a suit'. A footnote

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<sup>73</sup> William Comer Petheram, *The Law and Practice Relating to Discovery by Interrogatories under the Common Law Procedure Act, 1854; Together with an Appendix of Precedents, and Full Index* (William Maxwell, London 1864).

<sup>74</sup> S March Phillipps and Thomas James Arnold, *A Treatise on the Law of Evidence, Tenth English Edition, With Considerable Alteration and Additions, Being Fifth American Edition With Cowen and Hill's Notes, With Additional Notes and References to the English and American Cases to the Present Time*, by Isaac Edwards, Counselor at Law, 3 vols, (Banks & Brothers, New York 1868).

<sup>75</sup> This is the correct spelling of the defendants' surname according the original Chancery documents, suggesting that this case was being independently reported and was not merely copied from the English reports.



cites a case supporting this, to which is made – inside the same footnote – an addition, viz. ‘A person holding a document prepared by him as solicitor for a person under whom both plaintiffs and defendants claim, and for a third party, a mortgagee, is held not bound to produce it; it is otherwise where no third person is interested in the preparation of the document’, then *Chant v Browne* as cited.<sup>76</sup>

(v) James Fitzjames Stephen’s modest book (only 198 pages), albeit with a promising title,<sup>77</sup> is silent on both *Chant* and *Turton*, and on bills of costs, although it is fair to concede that it was not written to be a reference work to provide a comprehensive coverage of the law of evidence but rather as a manifesto to seek a legislative consolidation of the principles of evidence.<sup>78</sup>

(vi) Henry Wyatt Hart and Ernest Eiloart’s short work,<sup>79</sup> little more than a pamphlet, includes a number of interesting observations and case-law examples on privilege, some of which seem not to be in other contemporary authors on the subject, but none is on solicitors’ bills of costs *per se* and, in the course of their discussions, they cite neither *Chant* or *Turton*. They perhaps depart slightly in spirit from the edifice of privilege seen in, for example, John Pitt Taylor, with such principles such as ‘when a brief is produced, the privileged part may be sealed up’, ‘privilege cannot be claimed for private and confidential letters from a stranger to a suit on the ground that the writer forbids their production’, ‘letters from a stranger to a suit to a plaintiff’s solicitor, though expressed to be written in confidence, are not privileged unless written with a view to litigation’, and ‘privilege does not extend to communications made to a solicitor, but not in his professional capacity’, are supported by various case references, but not relevant to *Chant* or *Turton*.

(vii) William Blake Odgers’ updating of Edmund [to be distinguished from ‘Maurice’] Powell’s *The Principles and Practice of the Law of Evidence*<sup>80</sup> contained

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<sup>76</sup> Above (n 74) 1, 154, 124.

<sup>77</sup> James Fitzjames Stephen, *A Digest of the Law of Evidence* (1<sup>st</sup> edn Macmillan & Co., London 1876).

<sup>78</sup> See KJM. Smith, ‘Stephen, Sir James Fitzjames, first baronet (1829-1894), judge and writer’, *Oxford Dictionary of National Biography*, at [www.oxforddnb.com](http://www.oxforddnb.com).

<sup>79</sup> H Wyatt Hart and Ernest Eiloart, *Interrogatories, Rules relating to the Law of Discovery and Inspection: Now Administered in the High Court of Justice* (William Maxwell, London 1879).

<sup>80</sup> W Blake Odgers, *Powell’s Principles and Practice of the Law of Evidence* (re-written and re-arranged by W Blake Odgers) (9<sup>th</sup> edn Butterworth & Co, London 1910). Powell’s original work was

no mention of *Turton* (nor of *Burton v Dodd*), but used only *Chant(I)* to make the oft-repeated point about a solicitor's privilege extending to a case where he had a personal interest.

## 7. Conclusion

This article has had two related, but distinct, purposes:

- to dispute any current absolute claim for legal professional privilege for solicitors' bills of costs
- to expose the fragility of the unquestioning reliance, both in the past and certainly in the current legal era, on *Chant* and *Turton* as authorities for the blanket privilege protection given to such bills

It is academically interesting how views with respect to the coverage of solicitors' bills of costs did evolve. Given how the principle of privilege developed throughout the nineteenth century, it would be unfair on the legal authors of that time for us now to infer that the standard principle of privilege in the later nineteenth century would not have been reasonably assumed by them to cover lawyers' bill, even if many of them did not mention this in their works. The nineteenth-century view embodied by later editions of John Pitt Taylor's work, for example, on what was actually covered by legal professional privilege was comprehensive and inclusive – any communication between a solicitor and client was, by the later nineteenth-century yardstick of him and others, covered by privilege. This view was been established by a number of cases earlier in the century<sup>81</sup> and, for Taylor, would necessarily have included bills of costs, even if (despite the copiousness of his work) he does not single out such bills out for any special mention (even in its post-*Minet v Morgan* edition).

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published as *The New Practice of Evidence* in 1855 (the British Library's copy of this edition is marked as having been destroyed); subsequent editions were all titled *The Principles and Practice of the Law of Evidence*. The 2<sup>nd</sup> edition (John Crockford, London 1859), the last prepared by Powell himself, mentions neither *Chant* case, nor bills of costs. The same is true of the 3<sup>rd</sup> edition (Butterworths, London 1869), this edition prepared by John Cutler and Edmund Fuller Griffin.

<sup>81</sup> Two were especially important and much cited by later authors: *Greenough and Others v Gaskell* [1833] 1 My. & K. 98; (1824-34) All ER Rep 767, and *Carpmael v Powis* [1846] 1 Ph. 687.

That, however, is a different matter from holding up the entire edifice of privilege for lawyers' bills for almost one hundred years exclusively, or effectively so, specifically on *Chant* and *Turton*. Given what we have sought to show about the extreme shakiness of the pedigree of these cases for the foundational purpose being attributed to them in *Halsbury*, it seems hardly defensible from the point of view of a convincing legal methodology that lawyers wanting to claim legal professional privilege for solicitors' bills of costs merely cite *Chant* and *Turton* in their original nineteenth-century citation styles, as some present-day ones still do, and assume 'case proven'. Of course, the laziest practitioners in all academic disciplines cite references at second hand without referring back to check their originals. Lawyers are not uniquely guilty of that academic peccadillo. However, given that the law is a client-based profession more than many others, such sloppiness may have more personal consequences.

Besides Bray and Ross, there seems only one author of a work on evidence published up to 1912 in all those examined who gave an independent support to this view. This is William Williamson Kerr. Indeed, it seems that his work was the first to pick up the purported precedent set by *Chant*, which was taken up by Bray (who added *Turton*), copied by Phipson (simply following Bray), till the statement in the first-edition *Halsbury*, and then by Ross alone. In any branch of law there are going to be iconic cases, ones that no work on its subject seeking any degree of academic respectability can afford not to mention or discuss. Such cases have been encountered in the present exercise: *Greenough*, *Carpmael* and *Minet*, for example, would surely all qualify as such. It is clear that *Chant* would not, and never would have done, and even less so would *Turton*.

It perhaps seems churlish to be sniffy about the degree of posthumous achievement recognized in standard published biographical sources. How people appear as entries in the *Dictionary of National Biography* is presumably through obvious qualification by dint of fame or achievement or by nomination as worthy candidates. The matter with entries in *Who's Who* (and so with the deceased in *Who Was Who*) is perhaps slightly different since some worthy inclusions may not be there because they have neither sought nor wanted their inclusion. Even so, despite these

provisos, in assessing renown it remains true that neither Bray<sup>82</sup> nor Ross has their own entry in the *Oxford DNB* and Bray alone is in *Who Was Who*. It is reasonable to agree that both may be considered contributors of some significance to late-nineteenth and early- to mid-twentieth centuries jurisprudence. However, neither ranks among the great iconic jurists of this period. Thus, it seems that the entire edifice of how *Chant* and *Turton* have been specifically cited for a hundred years as authorities to be accorded to claim the privileged status of solicitors' bills of costs is based on the pre-eminence given to the views of two – in historical terms – relatively obscure legal writers above those of others with greater claims to posthumous recognition. Perhaps on that ground alone, it may be time to re-consider the sacrosanct status of these cases.

However, this saga raises a deeper and perhaps more troubling question about legal methodology, with its disproportionate reliance on the tyranny of precedent that is often as in this case at the expense of logic and common sense. There is no reason why the amount that a solicitor charges should be routinely protected by privilege. Only in the most exceptional situation would such information confer a litigation advantage. Yet it is only in recent years that the common-sense principle of redaction to exclude sensitive content has become more widely accepted.

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<sup>82</sup> It is true that Bray does earn a mention in the entry for his elder brother, Sir Reginald More Bray, who was a rather controversial judge; see PA Landon, 'Bray, Sir Reginald More (1842-1923)', *Oxford Dictionary of National Biography* at [www.oxforddnb.com](http://www.oxforddnb.com).

**APPENDIX: BRIEF RELEVANT BIOGRAPHICAL DETAILS OF THE  
BRITISH AUTHORS OF THE WORKS CITED**

Lack of a reference to the *Oxford DNB* and/or to *Who Was Who/Who's Who* means that details of the individual concerned were alternatively ascertained from birth and death records, probate records, relevant *Law Lists* and Census records until 1901.

ARNOLD, Thomas James (1803/04–77) was from 1829 a Magistrate in the Westminster Police Court.

BRAY, Sir Edward, BA (Cambridge, 1873) (1849–1926); see text of article and *Who Was Who*, II.

BROWNING, William Ernst (1830–1916) was a barrister who had worked in the Probate, Divorce and Admiralty Division. He qualified on 26 January 1853. He had been one of His [*sic*] Majesty's Judges in Jamaica, thus at some time between 1901 and 1907.

BURROWS, Sir Roland, MA, LL.M (Cambridge), LL.D (London), QC (1882–1952) was a Barrister-at-Law in the Inner Temple and from 1928 Recorder of Cambridge. See *Who Was Who*, V.

CAHN, Charles Montague, BA (Oxford, 1923) (1900–85) was a Barrister-at-Law in the Inner Temple and on the Oxford Circuit and Assistant Judge Advocate-General from 1946. See *Who Was Who*, VIII.

CHANCE, Sir William, 2<sup>nd</sup> Baronet, BA (Cambridge, 1876), MA (Cambridge, 1879) (1853–1935) was a Barrister-at-Law in the Inner Temple. See *Who Was Who*, III.

CHANDLESS, Thomas, Jr., BA (Oxford, 1848), MA (Oxford, 1852) (1826–91) was a Barrister-at-Law in the Inner Temple.

CUTLER, John, BA (Oxford, 1863), KC (1839–1924) was a Barrister-at-Law in Lincoln's Inn. He was also long-serving as Professor of English Law and Jurisprudence and Professor of Indian Jurisprudence at King's College, London. See *Who Was Who*, II.

DAY, Sir John Charles Frederic Sigismund (1826–1908), later a judge in the Queen's Bench Division with a less than illustrious reputation because of inattentiveness and then a criminal judge of fearsome inclination towards intolerance and repressive punishment. See *Who Was Who*, I and *Oxford DNB*.

De HART, Edward Louis, BA (Cambridge, 1881), MA (Cambridge, 1883) (1858–1927) was a Barrister-at-Law. Born in Newcastle upon Tyne, his parents had originated in The Netherlands; his father, Joachim de Hart, was a ship broker.

DOWDESWELL, George Morley, BA (Oxford, 1830), MA (Oxford, 1833) (1809–93) was a Barrister-at-Law in the Inner Temple.

EILOART, Ernest (1853–91) was a Barrister-at-Law in the Inner Temple. Like his co-author five years earlier, he died far from home, in his case in Sierra Leone.

ELLISON, John Harold (1916–2000) was a Barrister-at-Law in Lincoln's Inn. See *Who Was Who*, X.

EVERSHED, Francis Raymond, 1st Baron, of Stapenhill (1899–1966) was Master of the Rolls from 1949 to 1962; see *Who Was Who*, VI and *Oxford DNB*.

GEDGE, Cecil Bertram, BA (Cambridge, 1888) (1866–1915) was a Barrister-at-Law. He was born in Mitcham, [then] Surrey. He volunteered into the London Regiment (Royal Fusiliers) in the First World War and as a Second Lieutenant was killed in action on 25 September 1915.

GOODMAN, Sir Victor Martin Reeves (1899–1967) was Clerk Assistant in the House of Lords; see *Who Was Who*, VI.

GRIFFIN, Edmund Fuller, BA (Oxford, 1861) (1839–90) was a Barrister-at-Law in Lincoln's Inn and on the Home Circuit and lectured in English law at King's College, London.

HARE, Thomas (1806–91) was a Barrister-at-Law in the Inner Temple. See *Oxford DNB*.

HARE, Sherlock (1840–1912) was a son of Thomas Hare above and also a Barrister-at-Law in the Inner Temple.

HART, Henry Wyatt, BA (Cambridge, 1873) (1851–86) was a Barrister-at-Law in the Inner Temple. He died in Aden on a journey back from Australia.

HOLLAND, Henry Thurstan, BA (Cambridge, 1847) (1825–1914) was a Barrister-at-Law in the Inner Temple. See *Oxford DNB*.

HOLLANDER, Charles Simon (born 1955); see *Who's Who*.

JACOBS, Bertram, LLB (London, 1899) (1871–1957) was awarded a First Class degree by private study and became was a Barrister-at-Law of the Inner Temple and on the South Wales Circuit, although his death certificate describes him as a solicitor.

JELF, Sir Ernest Arthur (1868–1949) was a Barrister-at-Law in the Inner Temple and became Senior Master of the Supreme Court and King’s Chief Remembrancer. See *Who Was Who*, IV.

KERR, William Williamson, BA (Oxford, 1843), MA (Oxford, 1845) (1820–1902) was a Barrister-at-Law in Lincoln’s Inn.

KIMBER, Lieutenant-Colonel Edmund Gibbs (1870–1954); see *Who Was Who*, V.

LESLIE, Harman John, MA (born 1946); see *Who’s Who*.

MALCOLM, John George (1800/01–72) was a Barrister-at-Law in the Inner Temple and on the Home Circuit and later Master of the Crown Office.

MARCHANT, James Robert Vernam, BA (Oxford, 1876), MA (Oxford, 1879) (1853–1936) was a Barrister-at-Law on the Oxford Circuit and later a County Court Judge. He had co-edited *Cassell’s Latin Dictionary (Latin-English and English-Latin)* (London, Paris & Melbourne: Cassell and Company, 1892). See *Who Was Who*, III.

ODGERS, William Blake, BA (Cambridge, 1871), MA, LLM (Cambridge, 1874), LL.D. (Cambridge, 1880), LL.D., KC (1849–1924) was the holder of many legal offices, including later the Recorder of Bristol. He was a well-known legal writer: eg, *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* (London: Stevens & Sons, 1<sup>st</sup> ed, 1891) and *A Digest of the Law of Libel and Slander; With the Evidence, Procedure, and Practice, Both in Civil and Criminal Cases, and Precedents of Pleadings* (London: Stevens and Sons, 1<sup>st</sup> ed, 1881). See *Who Was Who*, II.

PEASE, Joseph Gerald, BA (London, 1881) (1863–1928); see *Who Was Who*, II.

PEILE, Clarence John, BA (Cambridge, 1870) (1847–1900) became a Barrister-at-Law in the Inner Temple. In 1871 he had been a schoolmaster at Clifton College in Bristol.

PETHERAM, Sir William Comer (1835–1922) was a Barrister-at-Law in the Middle Temple. See *Who Was Who*, II.

PHILLIPPS, Samuel March, BA (Cambridge, 1802), MA (Cambridge, 1805) (1780–1862) was a legal writer and civil servant. He qualified in 1806 as a Barrister-at-Law in the Inner Temple, but did not practise. See *Oxford DNB*.

PHIPSON, Sidney Lovell, BA (Cambridge, 1877), MA (Cambridge, 1893) (1851–1929) was a Barrister-at-Law in the Inner Temple. He had attended Clare College, Cambridge and first produced his *The Law of Evidence* in 1892. He

produced up to the sixth edition in his own lifetime; the 2<sup>nd</sup> in 1898, the 3<sup>rd</sup> in 1902, the 4<sup>th</sup> in 1907, the 5<sup>th</sup> in 1910, and the 6<sup>th</sup> in 1921. The 7<sup>th</sup>, in 1930 after Phipson's death, was produced by Roland [later, Sir Roland] Burrows (who worked up to the 9<sup>th</sup> edition in 1952), assisted by Charles Montague Cahn. As we know, *Phipson* reached its 16<sup>th</sup> edition in 2005.

POLLOCK, Hon Sir Charles Edward (1823–97) was a Barrister-at-Law in the Inner Temple; see *Who Was Who*, I and *Oxford DNB*.

PORTER, Sir William Haldane (1867–1944) was an His Majesty's Inspector under the Aliens Act, 1905. See *Who Was Who*, IV.

POWELL, Edmund, BA (Oxford, 1849), MA (Oxford, 1852) (1826–64) attended Magdalen and Lincoln Colleges Oxford and became a Barrister-at-Law in the Inner Temple. He died at the early age of thirty-eight.

POWELL, Maurice, BA (Cambridge, 1862), MA (Cambridge, 1865) (1838–1914) was a Barrister-at-Law. He attended Trinity College, Cambridge.

RENTON, Sir Alexander Wood, MA, LLB (Edinburgh) (1861–1933) was once a Puisne Justice of the Supreme Court of Ceylon. See *Who Was Who*, III.

ROBERTSON, Maxwell Alexander (1874–1916), was a Barrister-at-Law of the Inner Temple and on the Midland Circuit. He was called to the bar in 1899. He died on 1 July 1916 in France of wounds received.

ROCHE, Sir Alexander Adair [later, Baron Roche of Chadlington] (1871–1956); see *Who Was Who*, V and *Oxford DNB*.

ROSCOE, Henry (1800–36) was legal writer and biographer, whose first edition of his work on evidence had appeared in 1827. See *Oxford DNB*.

ROSS, Robert Ernest, LLB (London, 1898) (1871–1960); see text of article.

SICHEL, Walter Sydney, BA (Oxford, 1877), MA (Oxford, 1880) (1855–1933) was a Barrister-at-Law in the Inner Temple and an author on numerous topics. See *Who Was Who*, III.

STARKIE, Thomas, BA (Cambridge, 1803), MA (Cambridge, 1806) (1782–1849) was jurist and legal writer on several important legal topics. He was a Barrister-at-Law in Lincoln's Inn and on the Northern Circuit. See *Oxford DNB*.

STEPHEN, Sir James Fitzjames, BA (Cambridge, 1852), MA (Cambridge, 1857), LLB (London, 1854), DCL (Oxford, 1878), QC (1829–94) was initially a Barrister-at-Law in the Inner Temple, then a judge and legal writer. See *Oxford DNB*.



TAYLOR, John Pitt, BA (Oxford, 1834) (1811–88) spent most of his career as a County Court Judge. When the first edition of his work on evidence was published, he was a Barrister-at-Law in the Middle Temple. In 1852 he became presiding judge over the Lambeth, the Greenwich and the Woolwich County Courts, positions held for a further thirty-three years. In October 1885, already nearly seventy-four, he tendered his resignation to the Lord Chancellor, citing his advancing years and ill health.

TURNER, Maxwell Joseph Hall (1907–60) was a Barrister-at-Law in the Inner Temple and on the South Eastern Circuit and became a Judge of the Mayor's and City of London Court. See *Who Was Who*, V.

WATERS, John Dallas (1889–1967) was a Barrister-at-Law in the Inner Temple. See *Who Was Who*, VI.

WHEATCROFT, George Shorrock Ashcombe, MA (1907–87) was a Master of the Supreme Court (Chancery Division). See *Who Was Who*, VIII and *Oxford DNB*.

WIGRAM, Sir James, BA (Cambridge, 1815), MA (Cambridge, 1818) (1793–1866) was 'one of His Majesty's Counsel', a Fellow of the Royal Society, and a Vice-Chancellor from 1841 to 1850. See *Oxford DNB*.